INDIANA CRIMINAL PATTERN JURY INSTRUCTIONS

REVISIONS THROUGH SEPTEMBER, 2002

INVITATION FOR REVIEW AND COMMENT:

The Indiana Judges Association Criminal Instructions Committee is revising the Indiana Criminal Pattern Instructions for a new third edition. Focus has been on simplification of language for juries. The Committee invites comments from judicial officers and any other interested persons on these revisions. Please send comments to:

mmcmahon@courts.state.in.us
Indiana Judicial Center
115 West Washington Street, Suite 1075
Indianapolis, Indiana 46204-3424

Draft 1 - Basic Crime Definition Prototype

The crime of _____ is defined by law as follows:
A person who _____ commits _____.

Before you may convict the defendant, the State must have proven each of the following:
1. The defendant
2. _____,
3. _____.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the defendant not guilty of _____, a [felony] [a misdemeanor] , charged in Count ___.

Comment:

If an instruction on a defense is required, add it as an element the State must disprove, as shown in the Introduction to Chapter 10. {Committee: Chap. 10 intro is on following page.}

[GENERAL FORMAT WHEN ADDING A DEFENSE]

The crime of _____ is defined by law as follows:
A person who _____ commits _____.

Before you may convict the defendant, the State must have proven each of the following:

1. The defendant
2. _____.
3. _____.
4. and defendant
   [did not abandon the offense]
   [was not entrapped]
   [was not acting under duress]
   [was not acting in defense of a person]
   [was not acting in defense of his/her dwelling]
   [was not acting in defense of property]
   [was not acting from necessity]
   [was not involuntarily intoxicated]
   [did not act under mistake of fact].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the defendant not guilty of _____ as charged in Count ___.

Comment

.

The addition of the last element – disproving a defense – should only be given as a final instruction and after evidence has been introduced to put the defense in issue. This element will not be repeated in the specific instructions that follow, and is set forth here as an example of its use.

Chapter 1

Revised Pattern 1.01:

You have been selected as jurors and you are bound by your oath to try this case fairly and honestly.

Until you begin your deliberations, you must not talk about this case among yourselves or with anyone else. Do not talk to any of the parties, their lawyers or any of the witnesses. If anyone tries to talk about the case in your presence, you should tell the bailiff immediately and privately. If there is any publicity about this trial, you must not read, listen to or watch it.

You should focus your attention on the court proceedings and the evidence, and reach a verdict based upon what you hear and see in this court.

You should keep an open mind. You should not form or express any opinion or conclusion until [the Court submits] [I submit] the case to you for your deliberations.
(*Short form admonishment at every recess:*)

During the recess, you must not discuss this case nor permit anyone to discuss it in your presence. You must not form or express any opinion or conclusion about the case until it is finally submitted to you for your deliberations.

Revised Pattern 1.03

Under the Constitution of Indiana you have the right to determine both the law and the facts. The Court's/my instructions are your best source in determining the law.

Revised Pattern 1.05

You are to consider all the instructions together. Do not single out any certain sentence or any individual point or instruction and ignore the others.

Revised Pattern 1.07

In this case, the State of Indiana has charged the defendant with [Count 1: (*insert Count 1*), Count 2: (*insert Count 2*), etc.] The charge(s) read(s) as follows:
[*insert the Charge*]

Revised Pattern 1.09

[*Name of offense(s)*] charged [in Count I, II, etc.] is defined by law as follows:
[*Quote the statute.*]
Before you may convict the defendant, the State must have proved each of the following:
The defendant
[*list here elements of the charged crime*].

If the State fails to prove any of these elements beyond a reasonable doubt, you must find the defendant not guilty of _____, a [felony] [a misdemeanor] , charged in Count ___..

(Some editing is necessary in almost every case to exclude statutory provisions that have no application to the facts charged. Be sure to include elements of criminal intent, e.g., "knowingly" or "intentionally," which are required by caselaw and are omitted in the statute. Particular attention should be paid to those statutes with sentence enhancement built in because of prior convictions. The enhancement portion *must* be bifurcated and not referred to in any way in Phase I of the trial. Refer to Chapter 15 for appropriate language in Phase II of bifurcated trials.)

Revised Pattern 1.11

The charge which has been filed is the formal method of bringing the defendant to trial. The filing of a charge or the defendant's arrest is not to be considered by you as any evidence of guilt.

A plea of not guilty has been entered on behalf of the defendant.

Revised Pattern 1.13

Under the law of this State, a person charged with a crime is presumed to be innocent. To overcome the presumption of innocence, the State must prove the defendant guilty of each element of the crime charged, beyond a reasonable doubt.

The defendant is not required to present any evidence to prove his innocence or to prove or explain anything.

Revised Pattern 1.15

The burden is upon the State to prove beyond a reasonable doubt that the defendant is guilty of the crime(s) charged. It is a strict and heavy burden. The evidence must overcome any reasonable doubt concerning the defendant's guilt. But it does not mean that a defendant's guilt must be proved beyond all possible doubt.

A reasonable doubt is a fair, actual and logical doubt based upon reason and common sense. A reasonable doubt may arise either from the evidence or from a lack of evidence. Reasonable doubt exists when you are not firmly convinced of the defendant's guilt, after you have weighed and considered all the evidence.

A defendant must not be convicted on suspicion or speculation. It is not enough for the State to show that the defendant is probably guilty. On the other hand, there are very few things in this world that we know with absolute certainty. The State does not have to overcome every possible doubt.

The State must prove each element of the crime(s) by evidence that firmly convinces each of you and leaves no reasonable doubt. The proof must be so convincing that you can rely and act upon it in this matter of the highest importance.

If you find that there is a reasonable doubt that the defendant is guilty of the crime(s), you must give the defendant the benefit of that doubt and find the defendant not guilty of the crime under consideration.

Revised Pattern 1.17

You are the exclusive judges of the evidence, which may be either witness testimony or exhibits**.** In considering the evidence, it is your duty to decide the value you give to the exhibits you receive and the testimony you hear.

In determining the value to give to a witness's testimony, some factors you may consider are:

the witness's ability and opportunity to observe;
the behavior of the witness while testifying;
any interest, bias or prejudice the witness may have;
any relationship with people involved in the case;
the reasonableness of the testimony considering the other evidence;
your knowledge, common sense, and life experiences.

You should not disregard the testimony of any witness without a reason and without careful consideration. If you find conflicting testimony, you must determine which of the witnesses you will believe and which of them you will disbelieve.

The quantity of evidence or the number of witnesses need not control your determination of the truth. You should give the greatest value to the evidence you find most convincing.

Revised Pattern 1.19

During the trial, the Court/I may rule that certain questions may not be answered and/or that certain exhibits may not be allowed into evidence. You must not concern yourselves with the reasons for the rulings. The Court's/my rulings are strictly controlled by law.

Occasionally, the Court/I may strike evidence from the record after you have already seen or heard it. You must not consider such evidence in making your decision.

Your verdict should be based only on the evidence admitted and the instructions on the law. Nothing that [the Court says or does] [I say or do] is intended to recommend what facts or what verdict you should find.

Revised Pattern 1.21

You must decide the facts from your memory of the testimony and exhibits admitted for your consideration. You may take notes during the trial. However, do not become so involved in note taking that you fail to listen carefully and observe the witnesses as they testify.

New Pattern 1.22

Jurors may be allowed to ask questions of the witnesses, but there are rules regarding which questions may be asked, and the answers witnesses are allowed to give. Attorneys are trained to know these rules and to ask their questions accordingly.

If you have a question you wish to ask, you should raise your hand after the attorneys have asked all of their questions and <u>before</u> the witness leaves the witness stand. Then put your question in writing and give it to the bailiff. I will then consult privately with the attorneys, but it will be my decision alone whether any question may be asked. You should not consider any question that is submitted, but not asked.

Please do not directly speak to the court, the lawyers, the witnesses or your fellow jurors.

Comments

This is a mandatory preliminary instruction. Indiana Jury Rule 20(a)(7).

Revised Pattern 1.23

You should give separate consideration to each defendant. Each defendant is entitled to have his case decided on the evidence and the law that applies to him.

If any evidence is limited to [one defendant] [some defendants] you must not consider it in deciding the case of any other defendant[s].

Revised Pattern 1.25

The trial of this case will proceed as follows:

First, the attorneys will have an opportunity to make opening statements. These statements are not evidence and should be considered only as a preview of what the attorneys expect the evidence will be.

Following the opening statements, witnesses will be called to testify. They will be placed under oath and questioned by the attorneys [and/or the jury/you]. Exhibits may also be received as evidence. If an exhibit is given to you to examine, you should examine it carefully, individually, and without comment.

When the evidence is completed, the attorneys may make final arguments. These final arguments are not evidence. The attorneys are permitted to characterize the evidence, discuss the law and attempt to persuade you to a particular verdict. You may accept or reject those arguments as you see fit.

Finally, just before you begin your deliberations, I will give you further instructions on the law.

Revised Pattern 1.27

If, at any time, you realize you know something about the case or know a witness or the defendant, you must inform the bailiff privately at your earliest opportunity.

CHAPTER 10

INTRODUCTION

When a defense is raised properly and the evidence supports an instruction on it, the following general pattern should be used to incorporate the defense into the instruction on the elements of the crime:

The crime of _____ is defined by law as follows:

A person who _____ commits_____, a Class felony/misdemeanor.

Before you may convict the defendant, the State must have proved each of the following:

1. The defendant
2. [List element]

3. [List element]
4. and defendant

[did not abandon the offense]
[was not entrapped]
[was not acting under duress]
[was not acting in defense of a person]
[was not acting in defense of his/her dwelling]
[was not acting in defense of property]
[was not acting from necessity]
[was not involuntarily intoxicated]
[did not act under mistake of fact].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the defendant not guilty of _____ a Class _____felony/misdemeanor as charged in Count ___.

Comment

The addition of the last element – disproving a defense – should only be given as a final instruction and after evidence has been introduced to put the defense in issue. This element will not be repeated in the specific instructions that follow, and is set forth here as an example of its use.

Instruction 10.01. Legal Authority.
I.C. 35-41-3-1.

A person may not be convicted for engaging in conduct that would otherwise be a crime if he has legal authority to do so.

It is an issue in this case whether the defendant had legal authority to [describe prohibited conduct.] Under Indiana law, a person is authorized to [describe prohibited conduct] when [describe applicable circumstances.]

The State has the burden of proving beyond a reasonable doubt that the defendant did not have legal authority.

Comments

This statute was intended to incorporate legal authority that is conferred both outside of the criminal code. An example is discipline of a child by a parent. The Committee contemplates that "applicable circumstances" will refer to the common law or statute that authorizes the otherwise criminal conduct. The Committee also contemplates that this instruction will be given in addition to the modified elements instruction that includes as an element this defense. The Committee also recommends that this instruction not be given in any case where a specific defense is provided under 35-41-3 or other statute.

Instruction 10.03A. Use of Force to Protect Person.
I.C. 35-41-3-2.

It is an issue whether the defendant acted in [self-defense] [defense of another person].

A person may use reasonable force against another person to protect [himself/herself from what he/she] [someone else] from what the defendant reasonably believes to be the imminent use of unlawful force.

A person is justified in using deadly force only if he/she reasonably believes that deadly force is necessary [to prevent serious bodily injury to himself/herself or a third person] [or] [to prevent the commission of a felony].

(However, a person may not use force if:

[he/she is committing a crime that is directly and immediately connected to the (confrontation))(*use a descriptive term based on evidence)*.]

[he/she is escaping after the commission of a crime that is directly and immediately connected to the (confrontation) (*use a descriptive term based on evidence)*.]

[he/she provokes a fight with another person with intent to cause bodily injury to that person]

[he/she has willingly entered into a fight with another person or started the fight, unless he withdraws from the fight and communicates to the other person his intent to withdraw and the other person nevertheless continues or threatens to continue the fight].)

The State has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense.

Comments

> [T]here must be an immediate causal connection between the crime and the confrontation. Stated differently, the evidence must show that but for the defendant committing a crime,the confrontation resulting in injury to the victim would not have occurred.

Mayes v. State, 744 N.E.2d 390 (Ind. 2001).

The committing a crime limits apply only when defendant "was actively engaged in the perpetration of a crime, and that criminal activity produced the confrontation wherein the force was employed." *Harvey v. State*, 652 N.E.2d 876 (Ind. Ct. App. 1995), *transfer denied* (homicide defendant entitled to invoke self-defense even though at time of alleged murder he had no license for his pistol and hence was committing the offense of possession of a handgun without a license).

The terms "deadly force," "bodily injury," and "serious bodily injury" are defined by law. See I.C. 35-41-1-7, I.C. 35-41-1-4, and I.C. 35-41-1-25; Instruction Nos. 14.49, 14.13, and 14.185.

Instruction 10.03B. Use of Force to Protect Dwelling.
I.C. 35-41-3-2.

It is an issue whether the defendant acted in defense of his/her dwelling [or adjoining property].

A person may use reasonable force, including deadly force, against another person if he/she reasonably believes that the force is necessary to prevent or terminate the other person's entry of or attack on his/her dwelling [or the land adjoining the dwelling, including buildings, used for domestic purposes.]

(However, a person may not use force if:

[he/she is committing a crime that is directly and immediately connected to the (entry or attack on his dwelling))(*use a descriptive term based on evidence)*.]

[he/she is escaping after the commission of a crime that is directly and immediately connected to the (entry or attack on his dwelling) (*use a descriptive term based on evidence)*.]

[he/she provokes a fight with another person with intent to cause bodily injury to that person]

[he/she has willingly entered into a fight with another person or started the fight, unless he/she withdraws from the fight and communicates to the other person his/her intent to withdraw and the other person nevertheless continues or threatens to continue the fight].)

The State has the burden of proving beyond a reasonable doubt that the defendant did not act in defense of his/her dwelling.

Comments

The statute here applies to attacks or entries on defendant's "curtilage." Few jurors will know what "curtilage" means and so the Committee has not employed it in the instruction. The Committee suggests that the "land adjoining the dwelling, including buildings, used for domestic purposes" appearing above will suffice in most cases to define "curtilage." In cases where a "curtilage" issue is in serious dispute, the trial judge may wish to use Instruction No. 14.42's more elaborate definition for " curtilage," derived from *Fox v. State*, 179 Ind. App. 267, 384 N.E.2d 1159 (1979)("curtilage" as used in common-law definition of arson).

The "committing a crime" or "escaping after the commission of a crime" limits on this defense do not apply if defendant was "coincidentally committing some [unrelated] criminal offense." The limits apply only when defendant "was actively engaged in the perpetration of a crime, and that criminal activity produced the confrontation wherein the force was employed." *Harvey v. State*, 652 N.E.2d 876 (Ind. Ct. App. 1995), *transfer denied* (homicide defendant entitled to invoke self-defense even though at time of alleged murder he had no license for his pistol and hence was committing the offense of possession of a handgun without a license). *See also Mayes v. State*, 744 N.E.2d 390 (Ind. 2001) ("There must be an immediate causal connection between the crime and the confrontation. Stated differently, the evidence must show that but for the defendant committing a crime,the confrontation resulting in injury to the victim would not have occurred.")

The terms "deadly force," "dwelling," "bodily injury," and "serious bodily injury" are defined by law. See I.C. 35-41-1-7, I.C. 35-41-1-10, I.C.35-41-1-4, and I.C. 35-41-1-25; Instruction Nos. 14.49, 14.75, 14.13, and 14.185.

Instruction 10.03C. Use of Force to Protect Property.
I.C. 35-41-3-2.

It is an issue whether the defendant acted in defense of his/her property.

[With respect to property other than a dwelling or curtilage,] [A] persont may use reasonable force, but not deadly force, against another person if he reasonably believes that the force is necessary to immediately prevent or terminate the other person's [trespass on] [or] [criminal interference with] property [lawfully in defendant's possession] [or] [lawfully in

possession of a member of defendant's immediate family] [or] [belonging to a person whose property defendant has authority to protect].

(However, a person may not use force if:

[he/she is committing a crime that is directly and immediately connected to the (trespass or ciminal interference with the property [lawfully in defendant's possession] [or] [lawfully in possession of a member of defendant's immediate family] [or] [belonging to a person whose property defendant has authority to protect]))(*use a descriptive term based on evidence)*.]

[he/she is escaping after the commission of a crime that is directly and immediately connected to the property ([lawfully in defendant's possession] [or] [lawfully in possession of a member of defendant's immediate family] [or] [belonging to a person whose property defendant has authority to protect]) (*use a descriptive term based on evidence)*.]

[he/she provokes a fight with another person with intent to cause bodily injury to that person]

[he/she has willingly entered into a fight with another person or started the fight, unless he withdraws from the fight and communicates to the other person his intent to withdraw and the other person nevertheless continues or threatens to continue the fight].)

The State has the burden of proving beyond a reasonable doubt that the defendant did not act in defense of his/her property.

Comments

If there is no evidence suggesting the property being protected was the defendant's dwelling or in his curtilage, omit the bracketed first phrase in the first sentence.

If there is an issue whether the property defendant was protecting was or was not part of the "curtilage," see the definitions for "curtilage" in Instruction No. 10.03B and its Commentary.

The "committing a crime" or "escaping after the commission of a crime" limits on this defense do not apply if defendant was "coincidentally committing some [unrelated] criminal offense." The limits apply only when defendant "was actively engaged in the perpetration of a crime, and that criminal activity produced the confrontation wherein the force was employed." *Harvey v. State*, 652 N.E.2d 876 (Ind. Ct. App. 1995), *transfer denied* (homicide defendant entitled to invoke self-defense even though at time of alleged murder he had no license for his pistol and hence was committing the offense of possession of a handgun without a license). *See also Mayes v. State*, 744 N.E.2d 390 (Ind. 2001) ("There must be an immediate causal connection between the crime and the confrontation. Stated differently, the evidence must show that but for the defendant committing a crime,the confrontation resulting in injury to the victim would not have occurred.")

The terms "deadly force," "dwelling," "bodily injury" are defined by law. See I.C. 35-41-1-7, I.C. 35-41-1-10, I.C.35-41-1-4, and I.C. 35-41-1-25; Instruction Nos. 14.49, 14.75, and 14.13.

INSTRUCTION NO. 10.05A

Instruction 10.05A. Citizen's Use of Reasonable Force Relating to Arrest or Escape.

I.C. 35-41-3-3.

A person other than a law enforcement officer is justified in using reasonable force against another person to effect that person's arrest or prevent that person's escape if:

1. a felony has been committed; and
2. there is probable cause to believe the other person committed that felony.

The felony of [name felony defendant asserts was committed by arrested person] is defined as [define felony].

It is a defense to the charge of [name offense charged] that

1. The felony of [name felony defendant asserts was committed by arrested person] had in fact been committed, and
2. The defendant knew that [name felony] had been committed, and
3. Based on all the circumstances known to the defendant there was a reasonable probability [name arrested person] had committed the felony, and
4. The defendant used reasonable nondeadly force to [arrest (name arrested person)] [prevent (name arrested person) from escaping].

The State has the burden of disproving this defense beyond a reasonable doubt.

10.05B Law Enforcement Officer's Use of Force Relating to Arrest or Escape.

[A law enforcement officer is justified in using reasonable force if he/she reasonably believes that the force is necessary to effect a lawful arrest. However, an officer is justified in using deadly force only if he/she reasonably believes that the force is necessary:

1. to prevent serious bodily injury to himself/herself or a third person or the commission of a forcible felony; or
2. to effect an arrest of a person who has committed or attempted to commit a felony.]

[A law enforcement officer making an arrest under an invalid warrant is justified in using force as if the warrant was valid, unless he knows that the warrant is invalid.]

[A law enforcement officer who has an arrested person in his custody is justified in using the same force to prevent the escape of the arrested person from his custody that he would be justified in using if he was arresting that person.]

[A guard or other official in a penal facility or a law enforcement officer is justified in using reasonable force, including deadly force, if he reasonably believes that the force is necessary to prevent the escape of a person who is detained in the penal facility.]

The State has the burden of disproving this defense beyond a reasonable doubt.

Comments

The terms "deadly force," "law enforcement officer," "serious bodily injury," "penal facility" and "forcible felony" are defined by law. See I.C. 35-41-1-7, I.C. 35-41-1-17, I.C. 35-41-1-25, I.C. 35-41-1-21 and I.C. 35-41-1-11; Instruction Nos. 14.47, 14.123, 14.185, 14.149 and 14.89.

Instruction 10.07 Intoxication - Involuntary.

I.C. 35-41-3-5.

Involuntary intoxication is a defense to the crime of [*insert name of crime.*] Involuntary

intoxication occurs when the defendant commits the crime charged while intoxicated and the intoxication has resulted from the introduction of a substance into the body of the defendant [without defendant's consent] or [when the defendant did not know the substance might cause intoxication.]

Involuntary intoxication is a defense to the crime charged if the intoxication rises to the level that the defendant was unable to appreciate the wrongfulness of the conduct at the time of the offense.

The State has the burden of disproving this defense beyond a reasonable doubt.

Instruction No. 10.09. Intoxication - Voluntary.
I.C. 35-41-2-5, I.C. 35-41-3-5.

Voluntary intoxication is not a defense to a charge of [*insert name of crime.*] You may not take voluntary intoxication into consideration in determining whether the defendant acted [intentionally] [knowingly] [recklessly] as alleged in the [information] [indictment].

Comments

This instruction is to be given when the charged crime was committed on or after July 1, 1997 and evidence that the defendant was intoxicated has been admitted.

The Indiana Supreme Court has held that the 1997 legislative abolition of the voluntary intoxication defense is to be given effect under the Indiana and federal Constitutions. *Sanchez v. State*, 749 N.E.2d 509 (Ind. 2001).

Instruction 10.11. Mistake of Fact.
I.C. 35-41-3-7.

It is an issue whether the defendant mistakenly committed the acts charged.

It is a defense that the defendant was reasonably mistaken about a matter of fact if the mistake prevented the defendant from:

[intentionally] [knowingly][recklessly] committing the acts charged

[or]

[committing the acts charged with specific intent to (specify specific intention for crime)].

The State has the burden of proving beyond a reasonable doubt that the defendant was not reasonably mistaken.

Instruction 10.13 Duress.
I.C. 35-41-3-8.

It is an issue whether the defendant was acting under duress.

It is a defense that the defendant was compelled to commit the acts charged by threat of imminent serious bodily injury to himself or another person. [With respect to offenses other than felonies, it is a defense that the defendant was compelled to commit the acts charged by force or threat of force.] Compulsion exists only if the force, threat, or circumstances would render a reasonable person incapable of resisting the pressure.

[This defense does not apply to a person who [recklessly, knowingly, or intentionally placed himself in a situation where it was foreseeable that he would be subjected to duress)] [committed an offense against the person as defined in IC 35-42].]

The State has the burden of proving beyond a reasonable doubt that the defendant was not acting under duress.

Comments

The term "serious bodily injury" is defined by law. See I.C. 35-41-1-25; Instruction No. 14.185.

Instruction 10.15 Entrapment.
I.C. 35-41-3-9.

The defense of entrapment is an issue in this case.

In order to overcome this defense, the State must prove beyond a reasonable doubt:

1. that the prohibited conduct of the defendant was not the product of [a law enforcement officer] [or] [a law enforcement officer's agent] using persuasion or other means likely to cause the defendant to engage in the conduct, or
2. that the defendant was predisposed to commit the offense.

Conduct merely affording a person an opportunity to commit the offense does not constitute entrapment.

Comments

The State avoids the defense of entrapment by disproving either of the two elements required for the defense. *Albaugh v. State*, 721 N.E.2d 1233 (Ind. 1999).

Instruction 10.17. Abandonment.
I.C. 35-41-3-10.

It is an issue whether the defendant abandoned his effort to commit the crime charged.

It is a defense to a charge of [aiding, inducing or causing an offense] [attempt] [conspiracy] that the defendant voluntarily abandoned his effort to commit the [*insert name of crime attempted, conspired to, or aided*] and voluntarily prevented its commission.

The State has the burden of disproving this defense beyond a reasonable doubt.

Comment:

It has been noted that when the evidence indicates defendant's decision to abandong the crime was the product of "an extrinsic factor," such as fear of detection or arrest, then an instruction on abandonment is properly refused. *Patterson v. State*, 729 NE 2d 1035 (Ind. Ct. App. 2000).

Instruction 10.19 Accident.
This instruction has been withdrawn.

Comments

The "accident"instruction formerly appearing here has been withdrawn. In reviewing this instruction and considering the "accident" "defense," the Committee could not conceive of a situation in which the principles incorporated in an instruction on "accident" would not also be conveyed to the jury by the standard pattern charges on the elements of the crime, the State's burden to prove, etc..

The Committee also noted that the "accident" instruction appearing in prior versions of this work was taken from *Gunn v. State*, 174 Ind. App. 26, 365 N.E.2d 1234 (1977), which reviewed a conviction for a 1973 homicide and accordingly did not apply the current Indiana Penal Code

as revised in 1976. Subsequent decisions applying the present penal code and addressing "accident" instruction issues have not considered whether "accident" instructions are appropriate and, if so, how they ought to be worded. *See, e.g., Wrinkles v. State*, 690 N.E.2d 1156 (Ind. 1977)(as State did not contest whether tendered "accident" instruction "stated the law," Indiana Supreme Court did not address the issue).

Instruction 10.21. Alibi.
I.C. 35-36-4-1.

This instruction has been withdrawn.

Comments

The "alibi" instruction formerly appearing here has been withdrawn.

In reviewing the former instruction and considering the "alibi" defense, the Committee concluded that by far the most important aspect of "alibi" is the effect it may have in some cases of narrowing the time frame in which the State must prove the defendant committed the crime. This narrowing effect does not necessarily occur whenever the defendant files a notice of alibi, but in cases where it does the State must prove the defendant was present at the time and place in its answer to defendant's alibi notice:

> . . . [T]he mere fact that a defendant raises an alibi defense does not necessarily make time an essential element of an offense. However, where the State's answer to the notice of alibi and evidence points exclusively to a specific date, and the defendant presents a defense based on that date, the jury's consideration of the defendant's guilt should be restricted to that date.

Sangsland v. State, 715 N.E.2d 875, 878-79 (Ind. Ct. App. 1999), *transfer denied* 726 N.E.2d 309 (Ind. 1999).

If a conventional "alibi" instruction is requested and the judge decides one ought to be given, the Committee suggests that the term "alibi" not be used, first to avoid having to define it and second because it may have a negative connotation for the jury. The Committee also recommends that the instruction not use the term "defense," because "alibi" is not an affirmative defense but rather consists of evidence on defendant's presence at the crime, an essential element the State has to prove beyond a reasonable doubt. The Committee suggests the following instruction:

> You have heard evidence that at the time of the crime charged the defendant was at a different place so remote or distant [or that such circumstances existed] that he could not have committed the crime. The State must prove beyond a reasonable doubt the defendant's presence at the time and place of the crime.

Instruction No. 10.23. Necessity.

The defense of necessity is an issue in this case.

The defense of necessity applies when:

(1) the act charged as criminal was the result of an emergency and was done to prevent a significant harm;

(2) there was no adequate alternative to the commission of the act;

(3) the harm caused by the act was not disproportionate to the harm avoided;
(4) the Defendant had a good-faith belief that his/her act was necessary to prevent greater harm;
(5) the Defendant's belief was objectively reasonable under all the circumstances of the case; and
(6) the Defendant did not substantially contribute to the creation of the emergency.

The State has the burden to prove beyond a reasonable doubt that the defendant was not acting out of necessity, and may do so by disproving any one of the above facts.

Comments

Necessity is a common law defense. *Toops v. State*, 643 N.E.2d 387 (Ind. Ct. App. 1994).

"In order to negate a claim of necessity, the State must disprove at least one element of the defense beyond a reasonable doubt." *Dozier v. State*, 709 N.E.2d 27, 29 (Ind. Ct. App. 1999).

Chapter 12

Instruction 12.01. Direct Evidence Circumstantial Evidence Inference.

Direct evidence means evidence that directly proves a fact, and that, if true, conclusively establishes that fact.

Circumstantial evidence means evidence that proves a fact from which you may conclude the existence of (an)other fact(s).

It is not necessary that facts be proved by direct evidence. Both direct evidence and circumstantial evidence are acceptable as a means of proof. A conviction may be based solely on circumstantial evidence. Where proof of guilt is by circumstantial evidence only, it must be so conclusive and point so convincingly to the guilt of the accused that the evidence excludes every reasonable theory of innocence.

Instruction 12.03. Defendant's Statement.

Evidence has been introduced that the defendant made a statement concerning the crime charged. It is for you to determine, in light of all the circumstances under which the statement was made, if it was properly obtained by the [police, prosecutor, law enforcement.] The law does not allow the [police, prosecutor, law enforcement] to obtain a statement by [abuse, threats, duress, or violence] [false promises]. If you find that [police, prosecutor, law enforcement] obtained the statement by such means, you should not consider the statement as evidence against the defendant. If you find from a consideration of all the evidence that the statement was properly obtained by [police, prosecutor, law enforcement], then it is for you to determine what value should be given to the statement.

Instruction 12.09 Defendant's Statement - Multiple Defendants.

A defendant's statement concerning the crime charged may not be considered by you against any defendant other than the one who made it.

Comments

This instruction is for trials with two or more defendants.

The instruction may become an issue in three situations:

(1) The instruction must be given on request when:

- A statement from one defendant who does not testify is offered as evidence;
- The statement is admissible because it does "not refer directly to the [co]defendant himself, but [becomes] incriminating [with respect to the codefendant] 'only when linked with evidence introduced later at trial,'" *Gray v. Maryland*, 523 U.S. 185, 196, 118 S.Ct. 1151, 1157, 140 L.Ed.2d 294 (1998); and
- The codefendant requests the instruction.

Under these circumstances, admitting the statement with the instruction does not violate the codefendant's confrontation rights. *Gray v. Maryland*, *supra*; *Richardson v. Marsh*, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987).

(2) The instruction will not avoid reversible error if:

- A statement from a defendant who does not testify is offered as evidence;
- The statement is **inadmissible** because, considered by itself, it incriminates the codefendant, so that admitting it unchanged will violate the codefendant's confrontation rights, *Bruton v. United States,* 391 U.S. 123, 20 L. Ed. 2d 476, 88 S. Ct. 1620 (1968); and
- The codefendant objects.

In this situation, the statement may perhaps be made admissible by "redaction" to remove all inferences which might incriminate the objecting codefendant. If it cannot be redacted sufficiently, it must be excluded, and admitting it with the instruction is a constitutional error.

The Committee notes for the judge that extensive "redaction" is often needed and even then may be inadequate. A redaction which simply "replace[s] a proper name with an obvious blank, the word 'delet[ed],' a symbol, or similarly notif[ies] the jury that a name has been deleted" violates *Bruton*, when the statement "obviously refer[s] directly to someone, often obviously to [codefendant], and involve[s] inferences [incriminating codefendant] that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial." *Gray v. Maryland, supra*, 523 U.S. at 195 and 196, 118 S. Ct. at 1156 and 1157.

(3) The instruction is properly used when:

- A defendant testifies;
- That defendant's statement is offered as evidence against him;
- The statement may incriminate the codefendant;
- The testifying defendant is subject to full and effective cross-examination about the statement, so that codefendant has no *Bruton* confrontation objection to the statement. *See Nelson v. O'Neil*, 402 U.S. 622, 627, 91 S.Ct. 1723, 1726, 29 L.Ed.2d 222 (1971)("[t]he Constitution as construed in *Bruton*, in other words, is violated only where the out-of-court hearsay statement is that of a declarant who is unavailable at the trial for 'full and effective' cross-examination");
- The statement is hearsay as to the codefendant under Evidence Rule 801 (e.g., the statement was not sworn and is inconsistent with the testifying defendant's testimony); and
- The codefendant requests, pursuant to Indiana Evidence Rule 105, a limiting instruction that the statement may not be considered against him.

Instruction 12.11 Multiple Defendants Separate Consideration.

You should give separate consideration to each defendant. Each defendant is entitled to have his case decided on the evidence and the law that applies to him/her

Any evidence which was limited to [one defendant] [some defendants] should not be considered by you as to any other defendant[s].

Comments

This instruction is the same as Preliminary Instruction 1.23 except the tense has been changed for use as a final instruction.

Instruction 12.13. Dying Declaration.

This instruction has been withdrawn.

Comment

The Committee recommends that this instruction be deleted. The admission into evidence of a dying declaration is a function for the trial judge under Rule 804(b)(2). Once it is admitted, the general instruction about weighing evidence is sufficient.

Instruction 12.15. Evidence of Defendant's Reputation.

This instruction has been withdrawn.

Comment

The committee recommends that this instruction be withdrawn. The admission of reputation evidence is a function for the trial judge. Once the evidence is admitted, the general instruction about consideration of evidence is sufficient.

Instruction 12.17. Other Crimes, Wrongs, or Acts.
Indiana Rule of Evidence 404(b).

Evidence has been introduced that the defendant was involved in (crimes) (a crime) (wrongful conduct) (bad acts) other than (those) (that) charged in the information. This evidence has been received solely on the issue of defendant's (identity) (motive) (intent) (preparation) (plan) (knowledge) (absence of mistake) (absence of accident) (sanity). This evidence should be considered by you only for that limited purpose.

Comments

This instruction may be given as an admonition simultaneously with the admission of Indiana Evidence Rule 404(b) evidence. Under Evidence Rule 105 defense counsel must request the admonition and the court is not required to give it *sua sponte*.

Instruction No. 12.19. Impeachment and Substantive Evidence.

This instruction is withdrawn, as it no longer "reflect[s] current law and should not be used in trials in this state," *Humphrey v. State*, 680 N.E.2d 836, 840 (Ind. 1997).

Instruction 12.21 Impeachment — Prior Inconsistent Statements.

The credibility of a witness may be attacked by introducing evidence that on some former occasion the witness [made a statement] [made a written statement] [in former testimony testified] [acted in a manner] inconsistent with his testimony in this case. Evidence of this kind may be considered by you in deciding the value of the testimony of the witness.

Instruction No. 12.23. Escape.

This instruction has been deleted.

Comments

Instructions on flight should not be given. *Dill v. State*, 741 N.E.2d 1230 (Ind. 2001). The same rationale for concluding flight instructions are error applies to instructions on escape, and so the Committee has deleted this instruction.

Instruction 12.25. Flight.

This instruction has been deleted.

Comments

Instructions on flight should not be given. *Dill v. State*, 741 N.E.2d 1230 (Ind. 2001).

Instruction 12.27. Motive.

Motive is what causes a person to act. The State is not required to prove a motive for the crime charged.

Instruction 12.29. Expert Testimony - Hypothetical Question

A person who has specialized education, knowledge or experience is permitted to express an opinion in those areas. You should evaluate this testimony as you would other evidence in this case. You should also consider the witness's skill, experience, knowledge, and familiarity with the facts of this case.

[Questions have been asked in which the witness was asked to assume that certain facts were true and to give an opinion based upon those facts. If you find that any assumed fact is not true, you may consider that in determining the value of the opinion.]

Comments

The bracketed second paragraph should be given only if hypothetical questions are involved.

Instruction 12.31. Opinion of Layperson.

Comment: This instruction is withdrawn. The Committee suggests that Instruction 12.29 can be modified to cover this issue if a judge considers an instruction necessary. Rule 701 greatly expands the areas in which lay opinions can be given beyond the issues listed in the withdrawn instruction.

Instruction 12.33 . Testimony of an Accomplice.

Comment: The committee recommends that this instruction be withdrawn as it is covered by the general instruction on credibility of witnesses.

Instruction 12.35. Date of Crime Charged.

I.C. 35-34-1-2.

The State is not required to prove that the crime charged was committed on the particular date [during a particular time period] alleged in the [information][indictment].

Comments

This instruction should be given only when there is a variance between the date alleged in the indictment or information and the evidence, and all dates are within the period of limitation.

Note: This instruction cannot be used when an alibi response by the State alleges a specific date and time and the defendant asserts a defense. Then, proof of the date and time becomes an element. See Comments to Instruction No. 10.21, Alibi.

Instruction 12.37. Statute of Limitation — Defendant Out of State.

I.C. 35-41-4-2.

It is a defense to the crime charged that the case did not begin within the time allowed by law.

A person may not be found guilty of [insert name of crime charged] unless the case began [within five years after the commission of the crime *(if B,C, or D felony)*]

[within two years after commission of the crime *(if misdemeanor)*]
[before the date the alleged victim reached thirty-one (31) years of age *(if child molesting under I.C. 35-42-4-2(a), vicarious sexual gratification, child solicitation, child seduction or incest)*]
[within five years after commission of the crime if at the time of the crime the defendant was at least sixteen years of age and the alleged victim was not more than two years younger than the defendant *(for child molesting under I.C. 35-42-4-3(c)(repealed) or I.C. 35-42-4-3(d) (repealed)*]
[within five years after maturity of the instrument *(if the crime is forgery or uttering a forged instrument)*].

[This case began on _____ (use if parties agree on beginning date.]

[or]

[A case begins on the earlier of the following events: the date the charge was filed, the date a valid arrest warrant for the crime was issued, or the date the defendant was lawfully arrested without a warrant].

The time period for beginning a criminal case does not include any period of time:

[the defendant was not usually and publicly residing in Indiana]

[the defendant concealed himself so that he could not be officially notified of the case against him]

[the defendant concealed evidence of the offense and evidence of the offense was unknown to the prosecuting attorney and could not have been discovered by the prosecutor by exercise of due diligence]

[the defendant was elected or appointed to an office under a statute or the constitution, and the offense charged is theft or conversion of public funds or bribery while in public office].

The burden is on the State to prove beyond a reasonable doubt that the case did begin within the time allowed by law.

Comments

The Committee notes that in many circumstances the facts concerning the commencement of an action will not be in dispute and that a judge may determine the issue of the statute of limitations defense in ruling on a motion to dismiss. When there is an evidentiary dispute as to the date the action commenced or whether the statute has been tolled, defendant may have a right to trial by jury on such issues.

A case commences on the earlier of date of filing of indictment or information, date of issuance of valid arrest warrant, or date of lawful arrest without a warrant.

Prosecution for Murder or a Class A felony may be commenced at any time. If a case is dismissed, a new prosecution may be commenced within ninety (90) days after dismissal even if the period of limitation has expired at the time of the dismissal or will expire within ninety (90) days after dismissal even if the period of limitation has expired at the time of the dismissal or will expire within ninety (90) days of the dismissal, I.C. 35-41-4-2(f). Commencement of an action is defined in I.C. 35-41-4-2(h).

The Committee also recommends that the following language be inserted as an element in the general elements instruction: the case did begin within the time allowed by law.

Instruction 12.39. Agreed Facts.

When the parties agree to certain fact[s], you should accept the fact[s] as true.

Instruction 12.41. Judicially Noticed Facts.

The court has taken judicial notice that _____. You may, but are not required to, accept this as true.

Comments

Indiana Evidence Rule 201(b) requires the jury in a criminal case be allowed to reject judicially noticed facts.

Instruction 12.43. Depositions — Transcripts.
I.C. 35-37-4-3.

Some evidence was presented through a [deposition] [transcript of testimony] which was read to you. It is your duty to decide the value you give to this evidence. The significance of this evidence should be determined in the same manner other evidence is evaluated.

Instruction 12.45. Inspection of Place
I.C. 35-37-2-5.

The court will allow the jury to see [*state what is to be inspected*].

During your trip to and from the place to be inspected, you are not to discuss this case or any subject connected with the trial among yourselves or with anyone else.

At the place of inspection you are to remain together as a group. You are not to conduct an independent investigation.

What you see at the scene is not to be considered as evidence or in contradiction of evidence given in this case. The purpose of the inspection is to help each of you better understand and evaluate the evidence that is admitted in the courtroom.

Chapter 13

Instruction 13.01. Instructions to Be Considered as a Whole.

You are to consider all of the instructions [both preliminary and final] together. Do not single out any certain sentence or any individual point or instruction and ignore the others.

Instruction 13.03. Duty of Judge and Jury.

See Preliminary Instruction No.1.03.

[**Revised Pattern 1.03**

Under the Constitution of Indiana you have the right to determine both the law and the facts. The Court's/my instructions are your best source in determining the law.]

Instruction 13.05. Issue for Trial.

See Preliminary Instruction 1.07.

[**Revised Pattern 1.07**

In this case, the State of Indiana has charged the defendant with [Count 1: (*insert Count 1*), Count 2: (*insert Count 2*), etc.] The charge(s) read(s) as follows:
[*insert the Charge*].]

Instruction 13.07. Information/Indictment Not Evidence.

See Preliminary Instruction 1.11. The Committee recommends giving that instruction without the last sentence as a final instruction. The Committee also notes that Instruction 13.01 in effect incorporates Preliminary Instruction 1.11.

[**Revised Pattern 1.11**

The charge that has been filed is the formal method of bringing the defendant to trial. The filing of a charge or the defendant's arrest is not to be considered by you as any evidence of guilt.

A plea of not guilty has been entered on behalf of the defendant.]

Instruction 13.09. Presumption of Innocence - Burden of Proof.

See Preliminary Instruction 1.13.

[**Revised Pattern 1.13**

Under the law of this State, a person charged with a crime is presumed to be innocent. To overcome the presumption of innocence, the State must prove the defendant guilty of each element of the crime charged, beyond a reasonable doubt.

The defendant is not required to present any evidence to prove his innocence or to prove or explain anything.]

Comments

When this instruction is given as a final instruction, the verbs should be changed to past tense.

Instruction No. 13.10. Reasonable Doubt.

See Preliminary Instructions Nos. 1.15 and 1.16, and repeat here the one that was given as a preliminary.

[**Revised Pattern 1.15**

The burden is upon the State to prove beyond a reasonable doubt that the defendant is guilty of the crime(s) charged. It is a strict and heavy burden. The evidence must overcome any reasonable doubt concerning the defendant's guilt. But it does not mean that a defendant's guilt must be proved beyond all possible doubt.

A reasonable doubt is a fair, actual and logical doubt based upon reason and common sense. A reasonable doubt may arise either from the evidence or from a lack of evidence. Reasonable doubt exists when you are not firmly convinced of the defendant's guilt, after you have weighed and considered all the evidence.

A defendant must not be convicted on suspicion or speculation. It is not enough for the State to show that the defendant is probably guilty. On the other hand, there are very few things in this world that we know with absolute certainty. The State does not have to overcome every possible doubt.

The State must prove each element of the crime(s) by evidence that firmly convinces each of you and leaves no reasonable doubt. The proof must be so convincing that you can rely and act upon it in this matter of the highest importance.

If you find that there is a reasonable doubt that the defendant is guilty of the crime(s), you must give the defendant the benefit of that doubt and find the defendant not guilty of the crime under consideration.]

Instruction 13.11. Credibility of Witnesses - Weighing Evidence.

See Preliminary Instruction 1.17. The Committee notes that Instruction 13.01 in effect incorporates Preliminary Instruction 1.17.

[**Revised Pattern 1.17**

You are the exclusive judges of the evidence, which may be either witness testimony or exhibits**.** In considering the evidence, it is your duty to decide the value you give to the exhibits you receive and the testimony you hear.

In determining the value of a witness's testimony, some factors you may consider are:

the witness's ability and opportunity to observe;
the behavior of the witness while testifying;
any interest, bias or prejudice the witness may have;
any relationship with people involved in the case;
the reasonableness of the testimony considering the other evidence;
your knowledge, common sense, and life experiences.

You should not disregard the testimony of any witness without a reason and without careful consideration. If you find conflicting testimony, you must determine which of the witnesses you will believe and which of them you will disbelieve.

The quantity of evidence or the number of witnesses need not control your determination of the truth. You should give the greatest value to the evidence you find most convincing.]

Comment: This instruction does not have to be re-read if the language incorporating the preliminary instructions is used in Instruction Number 13.11.

Instruction 13.13. Recalling Evidence.

See Preliminary Instruction 1.21. The committee recommends giving only as a preliminary instruction. The Committee also notes that Instruction 13.01 in effect incorporates by reference Preliminary Instruction 1.11.

[**Revised Pattern 1.21**

You must decide the facts from your memory of the testimony and exhibits admitted for your consideration. You may take notes during the trial. However, do not become so involved in note taking that you fail to listen carefully and observe the witnesses as they testify.]

Instruction 13.15. Sympathy - Prejudice.

Your verdict should be based on the law and the facts as you find them. It should not be based on sympathy or bias.

Instruction 13.17. Rulings of Court.

See Preliminary Instruction 1.19. The committee recommends giving only as a preliminary instruction.

Instruction 13.19. Statements by Counsel.

Statements made by the attorneys are not evidence.

Instruction No. 13.20. Defendant Refuses Cross-Examination.

Once a defendant has testified, she/he has no right to refuse to be cross-examined. She/he must answer questions put to her/him when directed by the Court/me. If she/he refuses, you may consider that refusal to answer in weighing his/her credibility.

Comments

A version of this instruction was approved in *Benefiel v. State*, Ind., 578 N.E.2d 338, 348 (1991). The instruction might best be used as an admonition during trial. Striking testimony of the defendant who refuses cross is authorized in some jurisdictions, if the questions defendant refuses

to answer are relevant to the charged offense and the refusal results in a distortion of the defendant's testimony on direct. *See People v. Figueroa*, 719 NE.2d 108 (Ill. App. 1st Dist. 1999).

Instruction No. 13.21. Defendant does not testify.

No defendant may be compelled to testify. A defendant has no obligation to testify.

The defendant did not testify. You must not consider this in any way.

Comments

A criminal defendant has a Fifth Amendment right to have this instruction given upon request. *Carter v. Kentucky* (1981), 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241.

A criminal defendant also has the right not to have this instruction given under the Indiana Constitution, Article I, § 14; *Priest v. State* (1979), 270 Ind. 449, 386 N.E.2d 686, BUT:

IN A JOINT TRIAL, one codefendant's Indiana right not to have an instruction given must give way to the other codefendant's Fifth Amendment right to have the instruction given. *Lucas v. State* (1986), Ind., 499 N.E.2d 1090; *Horan v. State* (1994), Ind., 642 N.E.2d 1374.

Instruction 13.22. Defendant Testifies.

You should judge the testimony of the defendant as you would the testimony of any other witness.

Instruction 13.23. Jury Deliberations.

To return a verdict, each of you must agree to it.

Each of you must decide the case for yourself, but only after considering the evidence with the other jurors. It is your duty to consult with each other. You should try to agree on a verdict, if you can do so without compromising your individual judgment. Do not hesitate to re-examine your own views and change your mind if you believe you are wrong. But do not give up your honest belief just because the other jurors may disagree, or just to end the deliberations. After the verdict is read in court, you may be asked individually whether you agree with it.

When you begin, select one of your members as foreperson to manage the deliberations.

No one will be allowed to hear your discussions and no recording will be made of what you say. The bailiff is available to assist you with personal needs, but cannot answer any questions about the case.

Any question for [the Court] [me] must be in writing and given to the bailiff. [The Court often is] [I often am] not allowed to answer your questions, except by re-reading all of the jury instructions. Because [the Court has] [I have] given you those instructions, you may be able to answer your questions by reviewing them.

If there is a break in deliberations, do not talk about this case among yourselves or with anyone else.

[The Court is] [I am] submitting to you forms of possible verdicts you may return. The foreperson should sign and date the verdict[s] to which you all agree. Do not sign any verdict form for which there is not unanimous agreement. Sign only one verdict form for each count. The foreperson must return all verdict forms, signed or unsigned.

When you have agreed upon a verdict[s], inform the bailiff. When the parties are present, you will be brought back to court for the verdict to be read. After you return a verdict, you are under no obligation to discuss it with anyone.

Instruction 13.25. Penalty Imposed by Court.

These instructions do not contain any information concerning a possible sentence. [The Court alone is] [I alone am] responsible for sentencing if there is a conviction.

Comments

This instruction should not be used in a capital or life without parole case..

NO. 13.27a. Included Offense Introduction

[Instruction Numbers 13.27a, 13.27b, and 13.27c should be given together and in sequence when a lesser included offense instruction is given.]

The defendant is charged with [*charged offense*]. [*Name included offense(s)*] is/are included in Count I [*name charged offense*]. If the State proves the defendant guilty of [*the charged offense*], you need not consider the included crime(s). However, if the State fails to prove the defendant committed [*name charged offense*], you may consider whether he or she committed [*name included offense(s)*], which the Court/I will define for you.

You must not find the defendant guilty of more than one crime for each count.

Note: The Committee recommends that when naming the charged or included offense both the name [e.g., "Theft"] and the level of crime [e.g., "a class D felony"] be stated.

13.27b. Charged offense - elements

[Give standard instruction on charged offense, which should conclude with the following paragraph:]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the defendant not guilty of , a class , as charged in Count .

13.27c. Included offense - elements

You may then consider any included crime. The crime of [included offense] is included in the charged crime of [charged offense].

[Give standard elements instruction of included offense, replacing the last paragraph with the following:]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the defendant not guilty of [included offense] as included in Count ___.

Note: If there are more included offenses repeat the standard elements instruction for any additional included offenses.

Comments

The Indiana law for instructing on included offenses is substantial in extent and is beyond the scope of this work. The Committee suggests that initial resort be to *Wright v. State*, 658 N.E.2d 563 (Ind. 1995). See also *Garrett v. State*, 756 N.E.2d 523 (Ind. Ct. App. 2001), which holds that it is not reversible error to give lesser included instructions merely because the defendant has objected.

CHAPTER 15, DEATH PENALTY

PRELIMINARY INSTRUCTION NO. 1: Life Imprisonment Without Parole/ Death Penalty

As to the first phase of this trial, the evidence has concluded and you have found the defendant guilty of _____ (list convictions from guilt phase here). In this phase of the trial, the State of Indiana is seeking a recommendation from you that the defendant [be sentenced to life imprisonment without parole] or [receive the death penalty]. In order to seek this penalty, the State of Indiana was required to file a separate Charging Information which requested a recommendation from the jury to the judge that [the sentence of life imprisonment without parole] or [the death penalty] be imposed. The allegations contained in said charging Information are as follows:

[*Insert charging information facts and alleged aggravating circumstances here.*]

PRELIMINARY INSTRUCTION NO.2: Life Imprisonment Without Parole/Death Penalty

In the second phase of this trial, the burden is upon the State of Indiana to prove to each of you beyond a reasonable doubt at least one aggravating circumstance as set forth in the Charging Information wherein the State has requested a recommendation from you that the defendant receive [the sentence of life imprisonment without parole] or [the death penalty]. You should consider both aggravating and mitigating circumstances and recommend to the judge whether the defendant should receive [life imprisonment without parole or be sentenced to a term or years as would be determined by the judge] or [the death penalty, life imprisonment without parole, or be sentenced to a term of years as would be determined by the judge].

You may consider all the evidence introduced during the first phase of the trial together with all evidence introduced during this phase of the trial in determining your recommendation. Do not consider any offered evidence that the court did not allow into evidence or that the court ordered stricken from the record. In fact, such matters are to be treated as if you had never heard of them.

You have previously been instructed by me as to the rules of law regarding the burden of proof, judging the credibility of witnesses, and the manner of weighing the testimony. You have also been instructed as to definitions, including the definition of reasonable doubt. Those rules and definitions also apply in this phase of the trial.

PRELIMINARY INSTRUCTION NO. 3: Life Imprisonment Without Parole/Death Penalty

You are not permitted to consider any circumstances as weighing in favor of the sentence of [life imprisonment without parole] or [death or life imprisonment without parole] other than those specifically charged by the State of Indiana in the Charging Information. Again, the charged aggravating circumstances here are:

[*List here all charged aggravating circumstances.*]

PRELIMINARY INSTRUCTION NO. 4: Life Imprisonment Without Parole/Death Penalty

(The Committee suggests that despite the last paragraph in Preliminary Instruction No. 2 that any definitional instructions be read at this time such as reasonable doubt, the culpability instruction, etc. as are applicable in the case)

PRELIMINARY INSTRUCTION NO. 5: Life Imprisonment Without Parole/Death Penalty

For any of you to find that a mitigating circumstance exists, you must find that it has been proven by a preponderance of the evidence. A preponderance of the evidence means that it is only necessary to prove that a fact is more probably true than not true.

PRELIMINARY INSTRUCTION NO. 6: Life Imprisonment Without Parole/Death Penalty

A mitigating circumstance can be anything about the defendant and/or the offense which any one of you believes should be taken into account in tending to support a sentence less than [life imprisonment without parole] or [death or life imprisonment without parole]. Mitigating circumstances are not being offered as an excuse or justification for the crime you have found that the defendant committed. Instead, they are circumstances relating to the defendant's age, character, education, environment, mental state, life, and background, and/or any aspect of the offense itself and the defendant's involvement in it, which any one of you believes weighs against a sentence of [life imprisonment without parole] or [death or life imprisonment without parole].

Mitigating circumstances are different than aggravating circumstances in a number of ways. First, mitigating circumstances need not be proven beyond a reasonable doubt like aggravating circumstances must be. Second, your finding that any mitigating circumstance exists does not have to be unanimous. Each juror must consider and weigh any mitigating facts he or she finds to exist without regard to whether other jurors agree with that determination. Lastly, unlike aggravating circumstances, there are no limits on what facts any of you may find as mitigating. Mitigating circumstances may be established by any evidence introduced in the first or second phase of the trial by the State or the defense.

PRELIMINARY INSTRUCTION NO. 7: Life Imprisonment Without Parole/Death Penalty

You may recommend the sentence of [life imprisonment without parole] or [death or life imprisonment without parole] only if you unanimously find:

1. That the State of Indiana has proven beyond a reasonable doubt that at least one of the charged aggravating circumstances exists, and
2. That any mitigating circumstance or circumstances that exist are outweighed by the charged and proven aggravating circumstance or circumstances

PRELIMINARY INSTRUCTION NO. 8: Life Imprisonment Without Parole/Death Penalty

Your recommendation is an important part of the sentencing process. The judge must follow your sentencing recommendation.

(The Committee recommends that you do not instruct the jury that if they are unable to reach a sentencing recommendation that they will be discharged and the sentencing will proceed as if the hearing had been to the court alone. The concern with such an instruction is that the jury may use this instruction to diminish the role of the jury in the sentencing process. The Committee recommends that, if the jury asks the judge during deliberations what will happen if they are unable to agree to a recommendation, you instruct them how the case will proceed.)

PRELIMINARY INSTRUCTION NO. 9: Life Imprisonment Without Parole/Death Penalty

Nothing that I say or do during this phase of the trial is intended as a suggestion of what facts you should find or what your recommendation for sentencing should be. Each of you must determine the facts and make your sentencing recommendation accordingly.

FINAL INSTRUCTION NO. 1: Life Imprisonment Without Parole/Death Penalty

You are to consider all the instructions as a whole and are to regard each with the other instructions given to you by the court. Do not single out any certain sentence, or any individual point or instruction and ignore the others.

FINAL INSTRUCTION NO. 2: Life Imprisonment without Parole/Death Penalty

Under the Constitution of Indiana the jury is given the right to decide both the law and the facts. In fulfilling this duty, you are to apply the law as you actually find it and you are not to disregard it for any reason. The instructions from the judge are your best source in determining what the law is.

FINAL INSTRUCTION NO. 3: Life Imprisonment Without Parole/Death Penalty

Before you may consider recommending [life imprisonment without parole] or [death or life imprisonment without parole], you must unanimously find that the State has proven beyond a reasonable doubt:

1. [*recite first aggravating circumstance*], or
2. [*recite second aggravating circumstance*], or
   [*continue to enumerate each alleged aggravator joined by the word "or"*]

If you do not so unanimously find, you must recommend against [life imprisonment without parole] or [death or life imprisonment without parole].

You are not permitted to consider any circumstances as weighing in favor of the sentence of [life imprisonment without parole] or [death or life imprisonment without parole] other than the aggravating circumstances specifically charged by the State in the Charging Information.

The court will provide to you verdict forms as to each aggravating circumstance and you must sign each form to which there is unanimous agreement

FINAL INSTRUCTION NO. 4: Life Imprisonment Without Parole/Death Penalty

If you unanimously find at least one charged aggravating circumstance has been proven beyond a reasonable doubt, you must next consider the mitigating circumstances and then weigh the aggravating circumstance(s) against the mitigating circumstance(s). You may only consider recommending the sentence of [life imprisonment without parole] or [death or life imprisonment without parole] if you unanimously find that the aggravating circumstance(s) outweigh the mitigating circumstance(s).

Even if you unanimously find that the State has met its burden of proof as to both the existence of at least one charged aggravating circumstance and as to the aggravating circumstance(s) outweighing the mitigating circumstance(s), the law allows you to recommend that the judge impose a term of years instead of the sentence of [life imprisonment without parole] or [death or life imprisonment without parole].

The court will provide you with a verdict form as to the finding that you must make in regard to whether the aggravating circumstance(s) outweigh(s) the mitigating circumstance(s). Further, the court will provide you with a verdict form to complete in regard to your sentencing recommendation.

FINAL INSTRUCTION NO. 5: Life Imprisonment Without Parole/Death Penalty

(The Committee suggests that despite the last paragraph in Preliminary Instruction No. 2 that any definitional instructions be read at this time such as reasonable doubt, culpability instruction, etc., as are applicable in the case).

FINAL INSTRUCTION NO. 6: Life Imprisonment Without Parole/Death Penalty

For any of you to find that a mitigating circumstance exists, you must find that it has been proven by a preponderance of the evidence. A preponderance of the evidence means that it is only necessary to prove that a fact is more probably true than not true.

FINAL INSTRUCTION NO. 7: Life Imprisonment Without Parole/Death Penalty

The mitigating circumstances that may be considered by statute are as follows:
[*List all statutory circumstances here*.]
(The Committee recommends listing all statutory mitigating circumstances here whether you believe there is sufficient evidence or not).

FINAL INSTRUCTION NO. 8: Life Imprisonment Without Parole/Death Penalty

A mitigating circumstance can be anything about the defendant and/or the offense which any one of you believes should be taken into account in tending to support a sentence less than [life imprisonment without parole] or [death or life imprisonment without parole]. Mitigating circumstances are not being offered as an excuse or justification for the crime you have found that the defendant committed. Instead, they are circumstances relating to the defendant's age, character, education, environment, mental state, life, and background, and/or any aspect of the offense itself and the defendant's involvement in it, which any one of you believes weighs against a sentence of [life imprisonment without parole] or [death or life imprisonment without parole].

Mitigating circumstances are different than aggravating circumstances in a number of ways. First, mitigating circumstances need not be proven beyond a reasonable doubt like aggravating circumstances must be. Second, a finding of any mitigating circumstance need not be unanimous. Each juror must consider and weigh any mitigating facts he or she finds to exist without regard to whether other jurors agree with that determination. Lastly, unlike aggravating circumstances, there are no limits on what facts any of you may find as mitigating. Mitigating circumstances may be established by any evidence introduced in the first or second phase of the trial by the State or the defense.

FINAL INSTRUCTION NO. 9: Life Imprisonment Without Parole/Death Penalty

You should use your individual judgment to determine if the State has proven that the aggravating circumstance(s) outweigh any mitigating circumstance(s). This is a weighing and balancing process for each individual juror. The State is not required to prove beyond a reasonable doubt that the aggravating circumstance(s) weigh greater to meet its burden. The court will provide you with verdict forms.

FINAL INSTRUCTION NO 10: Life Imprisonment Without Parole/Death Penalty

During the first phase of the trial, the defendant was convicted of _____(list all murders and felony murders the defendant was convicted of). In Indiana, the murder and felony murder counts will merge for the purposes of sentencing if a term of years is imposed. If [life imprisonment without parole] or [the death penalty or life imprisonment without parole] is not

imposed, the sentence for murder is a fixed sentence that ranges from forty-five (45) years to sixty-five (65) years.

In addition, during the first phase of the trial, the defendant was also convicted of _____(list all other crimes. At sentencing, the judge must impose a specific number of years within the available ranges for each crime the defendant was convicted of. The judge can order that these sentences be served concurrently, meaning at the same time, or consecutively, meaning served one after the other. Based upon the statutory penalties for each crime the defenant was convicted of, if a term of years is imposed, the judge could impose a sentence on the defendant ranging from a minimum of forty-five (45) years if the sentences are ordered served concurrently to a maximum of _____ years if the sentences are ordered served consecutively.

FINAL INSTRUCTION NO. 11: Life Imprisonment Without Parole/Death Penalty

The current law in Indiana will allow the defendant, if he is sentenced to a fixed term of years, to earn credit for good behavior to apply against his sentence, with a maximum allowable credit of fifty percent (50%) of the sentence imposed by the judge.

FINAL INSTRUCTION NO. 12: Life Imprisonment Without Parole/Death Penalty

In Indiana, if the defendant is sentenced to life imprisonment without parole, he will not ever be eligible for parole or any form of credit time, and he will spend the rest of his life in prison.

FINAL INSTRUCTION NO 13: Life Imprisonment Without Parole/Death Penalty

The Governor of Indiana has the power, under the Indiana Constitution, to grant a reprieve, commutation, or pardon to a person convicted and sentenced for murder. A pardon completely eliminates a conviction and sentence. A commutation reduces the sentence, for example by changing a death sentence to one for life without parole or for a term of imprisonment. A reprieve is a temporary postponement of the execution of a sentence. The Indiana Constitution leaves it entirely up to the discretion of the Governor when and how to use this power.

FINAL INSTRUCTION NO. 15: Life Imprisonment Without Parole/Death Penalty

You are to consider both aggravating and mitigating circumstances and recommend whether [life imprisonment] or [the death penalty or life imprisonment] or a term or years should be imposed. You may consider all the evidence introduced in the first phase of the trial together with all the evidence introduced in this phase in making your determination. The law requires that your sentencing recommendation must be followed by the judge.

If you find that the State failed to prove beyond a reasonable doubt the existence of at least one charged aggravating circumstance, you must return the verdict form that so finds, and you must return the verdict form that recommends that the judge impose a term of years at sentencing.

If you find that the State did prove beyond a reasonable doubt the existence of at least one charged aggravating circumstance, you must return the verdict form that so finds. However, if you further find that any mitigating circumstance(s) are not outweighed by the aggravating circumstance(s), you must return that verdict form, and you must return the verdict form that recommends that the judge impose a term of years at sentencing.

If you find that the State did prove beyond a reasonable doubt the existence of at least one charged aggravating circumstance, you must return that verdict form. If you further find that any mitigating circumstances are outweighed by the aggravating circumstance(s), you must return that veridct form, , and you may make one of [two] or [three] possible sentencing recommendations and you must return the verdict form that states your recommendation. You may return the verdict

form recommendation that the defendant be sentenced to [life imprisonment without parole or the verdict form recommendation that the judge impose a term of years at sentencing] or [the death penalty, the verdict form recommendation that the defendant be sentenced to life imprisonment without parole, or the verdict form recommendation that the judge impose a term or years at sentencing].

Any findings you enter in a verdict form must be unanimous. Do not enter any findings or sign any verdict form to which there has not been a unanimous agreement.

FINAL INSTRUCTION NO. 16: Life Imprisonment Without Parole/Death Penalty

To return a verdict, each of you must agree to it.

Each of you must decide the case for yourself, but only after considering the evidence with the other jurors. It is your duty to consult with each other. You should try to agree on a verdict, if you can do so without compromising your individual judgment. Do not hesitate to re-examine your own views and change your mind if you believe you are wrong. But do not give up your honest belief just because the other jurors may disagree, or just to end the deliberations. After the verdict is read in court, you may be asked individually whether you agree with it.

When you begin, select one of your members as foreperson to manage the deliberations.

No one will be allowed to hear your discussions and no recording will be made of what you say. The bailiff is available to assist you with personal needs, but cannot answer any questions about the case.

Any question for [the Court] [me] must be in writing and given to the bailiff. [The Court often is] [I often am] not allowed to answer your questions, except by re-reading all of the jury instructions. Because [the Court has] [I have] given you those instructions, you may be able to answer your questions by reviewing them.

If there is a break in deliberations, do not talk about this case among yourselves or with anyone else.

[The Court is] [I am] submitting to you forms of possible verdicts you may return. When you retire to the jury room to begin your deliberations, the jury foreperson should preside over your deliberations and must sign and date the findings and recommendation to which you all agree. The foreperson must return all verdict forms, signed or unsigned. After you make your decision, you are under no obligation to discuss it or the reasons for it with anyone.

Instruction No. 16.15. Verdict Form - Aggravating Circumstance Found.

[For each alleged aggravating circumstance, the Committee recommends that you provide the following form:]

VERDICT FORM IA

VERDICT FOR FOR CHARGED
CIRCUMSTANCE NUMBER .....

We, the Jury, find that the State of Indiana has proven beyond a reasonable doubt the charged aggravating circumstance that [*state aggravating circumstance alleged here*.).

Date: .....

.....
Signature of ForePerson

Instruction No. 16.16. Verdict Form - Aggravating Circumstance Not Found.

[For each alleged aggravating circumstance, the Committee recommends that you provide the following form:]

VERDICT FORM IB

VERDICT FOR FOR CHARGED
CIRCUMSTANCE NUMBER .....

We, the Jury, find that the State of Indiana has not proven beyond a reasonable doubt the charged aggravating circumstance that [*state aggravating circumstance alleged here*.).

Date: .....

.....
Signature of Foreperson

Instruction No. 16.17. Verdict Form – Aggravating Circumstances and Mitigating Circumstances Balance.

VERDICT FORM II

We, the Jury, find that the State of Indiana has not proven that the charged aggravating circumstance(s) that exist outweigh any mitigating circumstances herein.

Date: .....

.....
Signature of Foreperson

We, the Jury, find that the State of Indiana has proven that the charged aggravating circumstance(s) that exist outweigh any mitigating circumstances herein.

Date: .....

.....
Signature of Foreperson

Instruction No. 16.18. Verdict Form – Recommending a Sentence.

VERDICT FORM FOR RECOMMENDING A TERM OF YEARS

We, the Jury, recommend a sentence of a term of years for Defendant .....

Date: .....

.....
Signature of Foreperson

-OR-

VERDICT FORM RECOMMENDING LIFE IMPRISONMENT WITHOUT PAROLE\

We, the Jury, recommend a sentence of life imprisonment without parole for Defendant .....

Date: .....

.....
Signature of Foreperson

-OR-

VERDICT FORM RECOMMENDING THE DEATH PENALTY

We, the Jury, recommend a sentence of death for Defendant .....

Date: .....

.....
Signature of Foreperson